Birthright Citizenship and Presidential Power

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The Halloween season is traditionally a time for scares and surprises in the United States. This year, President Trump got in on the act, floating a truly shocking idea on October 30. In an interview with Axios, the President declared that he intended to sign an executive order ending birthright citizenship in the United States. Critics denounced the idea as flatly foreclosed by the Constitution, and many wrote it off as a ploy by the President to rally his base in the run-up to the midterm elections.

The electoral calculations behind the President's proposal are not my concern here, and my legal analysis is below. (Spoiler alert: what the President proposed is flatly foreclosed by the Constitution.) But before diving into the law, it is worth pausing to consider what a breathtaking idea it is that the President could unilaterally determine who counts as a citizen. Citizenship status is, of course, fundamental: it carries with it a wealth of rights and duties, and it defines membership in the national political community. How a country regulates citizenship says something about it. For instance, using citizenship policy as a political weapon against regime opponents or targets is an authoritarian tell. The process by which a country makes citizenship policy also says something about its commitments. In the United States, the most basic rules governing citizenship are fixed by the Constitution, and the rest are made by Congress. For the executive branch to determine what it means to be an American citizen without engaging the legislature at all would amount to an astonishing rejection of democratic norms.

But let's turn back to the law. President Trump has not detailed the reasoning behind the claim that he could end birthright citizenship by executive order, but a former Trump administration official named Michael Anton did so this summer in a Washington Post op-ed. The constitutional provision widely understood to establish birthright citizenship is the first sentence of the Fourteenth Amendment, which reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Anton argues that we have been focusing too much on the "born . . . in the United States" part and too little on "subject to the jurisdiction thereof," although he himself is somewhat cagey on what the latter phrase means. Drawing from the congressional floor debates on the amendment, he quotes Senator Lyman Trumbull as opining, somewhat vaguely, that it meant "not owing allegiance to anybody else." The strongest arrow in Anton's quiver is a quote from Senator Jacob Howard, one of the provision's sponsors, that the language excludes "persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors or foreign ministers."

The argument collapses under even the most gentle scrutiny. Crucially, as others were quick to note, the bracketed "[or]" in the quote above is Anton's own invention.

The sentence, as it appears in the original record, reads: “This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.”

The “or” changes the meaning of the sentence, or at the very least, resolves a possible ambiguity in a particular direction. Anton would have us read the sentence to mean that foreigners, aliens, and the families of diplomats are separate classes who are all excluded from birthright citizenship. (Never mind that, if we’ve established that all foreigners and aliens are excluded, it would hardly be necessary to go on to say that the families of diplomats are too). But the “who belong to the families” clause could also be a restrictive clause, narrowing down the set of foreigners and aliens who are excluded from birthright citizenship. Which foreigners and aliens are excluded? Those who are born into the families of ambassadors and foreign ministers. And indeed, the legislative record as a whole makes unmistakably clear that the Senators understood the Fourteenth Amendment to extend birthright citizenship to non-U.S. nationals. The Supreme Court confirmed this reading of the clause as far back as 1898, in the *Wong Kim Ark* decision, holding that the U.S.-born child of Chinese nationals acquired American citizenship at birth.

Opponents of birthright citizenship have a fallback argument: even if the Fourteenth Amendment extends birthright citizenship to the children of foreign nationals *lawfully* in the country, it does not apply to those here unlawfully. Why not? The gist of the claim is that the framers and ratifiers of the Fourteenth Amendment did not have in mind for birthright citizenship to apply to persons in the country illegally. The key problem with this claim is that nothing in the Fourteenth Amendment expresses an intention to make citizenship hinge on the lawfulness or unlawfulness of parents’ presence in the country. Originalism is a powerful force in U.S. constitutional interpretation today, and this claim has at least an aura of originalism about it. But respectable originalists shouldn’t fall for it. The Fourteenth Amendment creates a legal norm that those born or naturalized in the United States and subject to its jurisdiction are citizens. Once we have established what the norm means—which, for an originalist, is what it meant at the time of enactment—our interpretive work is done. We don’t get to pick and choose among different circumstances covered by the norm and ask, would those who drafted or enacted the norm have made an exception for a case like this, if they’d thought about it?

The argument for why birthright citizenship can’t be abrogated by executive order is easy: birthright citizenship is in the Constitution, and the Constitution can only be changed through the amendment process. But even supposing that the Constitution did not insist on birthright citizenship, an executive order would be insufficient to change citizenship rules. Presidents can do a lot of things by executive order, but they cannot countermand a statute or a regulation. The relevant provision in the Immigration and Nationality Act just parrots the language of the Fourteenth Amendment with respect to birthright citizenship, so if the President were right that his move is consistent with the Constitution, it would also presumably be consistent with the statute, but there may be other statutory provisions that make birthright citizenship explicit. The President could issue an executive order instructing

agencies to revise regulations that reflected birthright citizenship, but those revisions might have to go through a notice and comment process. Again, all of this assumes that the Constitution left the matter open, and it does not.

The good news, then, is that the President cannot end birthright citizenship by executive order. The bad news is that he has loosed on the world the pernicious idea that he should be able to, and if the past is any guide, the idea will be taken up by many of his supporters. Happy Halloween.
